Evergreen New Hope Health & Rehabilitation Center *and* Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL–CIO, CLC. Case 32–CA–19189–1

May 8, 2002

DECISION AND ORDER

CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

This is a refusal-to-bargain case in which the Respondent seeks to contest the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 18, 2001, the General Counsel of the National Labor Relations Board issued a complaint and an amended complaint on November 16, 2001, and January 4, 2002, respectively (together, the amended complaint), alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to provide information following the Union's certification in Case 32–RC–4872–2. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982)). The Respondent filed an answer and an amended answer (together, the amended answer), admitting in part and denying in part the allegations in the amended complaint.

On January 24, 2002, the General Counsel filed a Motion for Summary Judgment. On February 5, 2002, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contention, raised and rejected in the representation proceeding, that the unit improperly includes its registered nurses, whom the Respondent maintains are statutory supervisors. The Respondent also admits its refusal to provide the information requested by the Union, but, relying on its claim that the Union was not properly certified, denies that it had any legal obligation to do so. The Respondent in any event denies that the requested information is relevant and necessary to the Union's role as bargaining representative.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[1]

We also find that there are no genuine issues of material fact warranting a hearing on the Union's request to bargain or its request for information. By letter dated October 26, 2001, the Union issued to the Respondent a "formal demand to bargain regarding the RNs" and advised that this was a "continuing demand." In the same letter, the Union requested the Respondent to provide the following information:

(1) Names, addresses and telephone numbers for all currently employed RNs in the bargaining unit;
(2) Dates of hire and current wage rates for all RNs in the bargaining unit;
(3) All benefits currently offered to the RNs;
(4) The number of paid holidays the RNs currently have;
(5) Any and all materials given to RNs during orientation; and;
(6) Any and all employment policies at New Hope that may affect the RNs.

In a followup letter dated January 4, 2002, the Union repeated its demand that the Respondent "recognize the Union, comply with the Union's request for information, and meet and bargain in good faith as soon as reasonably possible" for an agreement covering the certified unit.[2]

[1] By unpublished Order dated June 20, 2001, the Board, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), granted the Respondent's request for review of the Regional Director's Decision and Direction of Election with respect to the supervisory status of its registered nurses. The Board remanded the proceeding to the Regional Director to reopen the record on the issues of whether the registered nurses "assign" or "responsibly direct" other employees and the scope and degree of "independent judgment" used in the exercise of such authority. Following a hearing on remand, the Regional Director issued a Supplemental Decision and Direction of Election in which he, applying *Kentucky River*, reaffirmed his finding that the Respondent had failed to establish that its registered nurses were statutory supervisors. On September 21, 2001, the Board denied the Respondent's request for review of this supplemental decision.

[2] The Respondent denies in its amended answer that the Union's October 26, 2001 letter requested it to bargain. The General Counsel, however, has submitted with his motion copies of this letter evidencing the Union's request. The Respondent has not disputed the authenticity of that correspondence, or asserted any argument whatsoever in support of its denial. In any event, the Respondent does not deny that the Union again demanded bargaining in its January 4 letter. Accordingly, we find that the Respondent's denial does not raise any issue warranting a hearing.

The Respondent admits that it has refused to recognize or bargain with the Union over terms and conditions of employment for the certified unit, and that it has refused to provide the Union with the requested information for the certified unit. As indicated, the Respondent's refusals rest on its previously rejected claim that the Union was not properly certified because registered nurses were erroneously included in the unit. With respect to the Union's request for information, the Respondent also denies that the information is relevant and necessary to the Union's performance of its statutory duties as the employees' exclusive collective-bargaining representative. It is settled, however, that all of the requested information is presumptively relevant for purposes of collective bargaining and must be furnished on request. See *Maple View Manor*, 320 NLRB 1149, 1150–1151 (1996); *Trustees of the Masonic Hall*, 261 NLRB 436, 437 (1982); and *Mobay Chemical Corp.*, 233 NLRB 109, 110 (1977).

Accordingly, we grant the General Counsel's Motion for Summary Judgment, and will order the Respondent to bargain and to furnish the information requested by the Union.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and principal place of business in Tracy, California, has been engaged in providing medical services to patients, including long-term, custodial, and rehabilitative medical services.[4] During the 12-month period ending January 4, 2002, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $100,000, and purchased and received goods valued in excess of $5000 from points outside California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[3] The Respondent's request for a full evidentiary hearing therefore is denied. Chairman Hurtgen was not on the three-member panel of the Board that denied the Respondent's request for review of the Regional Director's supplemental decision applying *Kentucky River*. Member Bartlett did not participate in any phase of the underlying representation case. However, they agree that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case and that there are no genuine issues of material fact for trial. See *Pittsburgh Plate Glass*, supra.

[4] The complaint alleges that the Respondent is a Washington corporation. The Respondent denies this allegation, but admits that its principal place of business is in Tracy, California, and that it provides nursing home services to residents at this facility.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

At all material times, the Union has been the designated exclusive collective-bargaining representative of the following unit, which is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees (including cooks), housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by Respondent at its Tracy, California facility; excluding professional employees, technical employees, business office clerical employees, dietary/supervisor cooks, guards, and supervisors as defined in the Act.

At all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the above unit.

On September 10, 2001, the Board conducted a self-determination election in Case 32–RC–4872–2 among the following employees:

> All full-time and regular part-time registered nurses (RNs), employed by Respondent at its Tracy, California facility; excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant data set coordinator (AMDSC), all other professional employees, guards, and supervisors as defined in the Act.

The Regional Director's Supplemental Decision and Direction of Election stated that, "[i]f a majority of ballots are cast for the [Union], they will be taken to have indicated the employees' desire to be included in the existing unit." A majority of the voting group voted at the September 10, 2001 election in favor of representation by the Union, and the Acting Regional Director so certified on December 11, 2001.[5]

The employees in the recognized unit, including the voting group, constitute a unit appropriate for purposes of collective bargaining under Section 9(b) of the Act.

At all times since September 10, 2001, based on Section 9(a) of the Act, the Union has been and continues to be the exclusive collective-bargaining representative of the unit, including the voting group.

B. Refusal to Bargain

Since about October 26, 2001, and January 4, 2002, the Union, by letter, has requested the Respondent to bargain and to provide relevant and necessary informa-

[5] Previously, on October 16, 2001, the Acting Regional Director issued a Second Supplemental Decision and Certification of Representative, which inadvertently certified the voting group as a separate unit. The December 11 certification corrected this error.

tion, and since about the same dates the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after October 26, 2001, and January 4, 2002, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Evergreen New Hope Health & Rehabilitation Center, Tracy, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 250, Health Care Workers Union, Service Employees International Union (SEIU), AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit, including the voting group.

(b) Refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time registered nurses (RNs), licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees (including cooks), housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by Respondent at its Tracy, California facility; excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant data set coordinator (AMDSC), all other professional employees (other than registered nurses), technical employees, business office clerical employees, dietary/supervisor cooks, guards, and supervisors as defined in the Act.

Furnish the Union the information that it requested on October 26, 2001, and January 4, 2002.

(c) Within 14 days after service by the Region, post at its facility in Tracy, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2002

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Peter J. Hurtgen, Chairman

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Wilma B. Liebman, Member

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Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] The General Counsel has requested a remedy under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). We find that such a remedy would be inappropriate in this case. See *Edward J. DeBartolo Corp.*, 315 NLRB 1170, 1171 fn. 3 (1994).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Local 250, Health Care Workers Union,Workers Union, Service Employees International Union, AFL–CIO, CLC (the Union), as the exclusive representative of the employees in the bargaining unit, including the voting group.

WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following unit:

> All full-time and regular part-time registered nurses (RNs), licensed vocational nurses, nurses aides, certified nursing assistants, dietary employees (including cooks), housekeepers, maintenance employees, laundry employees, activity assistants, and janitors employed by us at our Tracy, California facility; excluding the director of nursing (DON), director of staff development (DSD), medical data set coordinator (MDS), assistant data set coordinator (AMDSC), all other professional employees (other than registered nurses), technical employees, business office clerical employees, dietary/supervisor cooks, guards, and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested on October 26, 2001, and January 4, 2002.

EVERGREEN NEW HOPE HEALTH & REHABILITATION CENTER